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KARI E. HONG (CA SBN 220252)
Law Offices of Kari E. Hong
1300 Clay Street, Suite 600
Oakland, CA 94612
Telephone: 510.384.4524
Facsimile: 510.228.0344
Email: kari@honglawfirm.com

AZIZ HUQ (NY SBN 4079877) (*Pro Hac Vice*)[1]
Brennan Center for Justice at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
T: 212.998.6289
F: 212.995.4550
E-mail: aziz.huq@nyu.edu

Attorneys for Proposed Amicus Curiae
Brennan Center for Justice

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION, MDL No. 1791 This Document Relates To All Cases Except: *Al-Haramain Islamic Foundation, Inc. v. Bush*, No. 07-0109; *Center for Constitutional Rights v. Bush*, No. 07-1115; *Guzzi v. Bush*, No. 06-06225; *Shubert v. Bush*, No. 07-0693; *Clayton v. AT&T Commc'ns of the Southwest*, No. 07-1187; *U. S. v. Adams*, No. 07-1323; *U. S. v. Clayton*, No. 07-1242; *U. S. v. Palermino*, No. 07-1326; *U. S. v. Rabner*, No. 07-1324; *U. S. v. Volz*, No. 07-1396	MDL Docket No 06-1791 VRW **MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE BRENNAN CENTER FOR JUSTICE; [PROPOSED] ORDER** **AMICUS CURIAE IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS** Date: December 2, 2008 Time: 10:00 a.m. Courtroom: 6, 17th Floor Judge: The Hon. Vaughn R. Walker

[1] Application for *Pro Hac Vice* Admission is pending.

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT the Brennan Center for Justice respectfully requests the Court's leave to participate as amicus curiae in the above-captioned case in opposition to the Government's motion to dismiss. Amicus has conferred with counsel for the Government and counsel for the Defendants. Both the Government and the Defendants decline to consent to this motion; they have not yet determined whether they will oppose it. Amicus files in advance of the traditional seven days after Petitioners' filing deadline so as to give both the Government and Defendants as much time as possible to respond to any arguments contained in the amicus brief to which they would like to reply.

Statement of Identity and Interest of Amicus Curiae

Amicus is a non-partisan public policy and law institute made up of twenty-five attorneys that focuses on fundamental issues of democracy and justice. It is a singular institution—part think tank, part public interest law firm, part advocacy group—that combines scholarship, legislative and legal advocacy, and communications to achieve its advocacy goals.

The Brennan Center is a leader in efforts aimed at the proper maintenance of separation-of-powers, especially in the context of national-security policy. It has substantial experience working on issues that implicate separation-of-powers concerns as well as efforts to thwart accountability for executive misconduct. To this end, the Brennan Center has published a book on the subject, *see* Frederick A.O. Schwartz & Aziz Huq, *Unchecked and Unbalanced, Presidential Power in a Time of Terror* (2007), filed numerous amicus briefs in cases across the country—including an earlier stage of this litigation—with separation-of-powers implications,[2] testified on several occasions

[2] *See, e.g.*, Brief for NAACP et al. as Amici Curiae, *Hepting v. AT&T*, 539 F.3d 1157 (9th Cir. 2008) (Nos. 06-17132, 06-17137); Brief for Brennan Center et al. as Amici Curiae, *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-
(footnote continued on following page)

before Congress on preservation of the separation of powers and the rule of law, *see Executive power and its Constitutional Limitations, Hearings before the House of Representatives Committee on the Judiciary*, 110th Cong. (2008) (Written testimony of Frederick A.O. Schwarz, Jr.); *Restoring the Rule of Law, Hearings before the Senate Committee on the Judiciary*, 110th Cong., (2008) (same), and represented clients in their challenges to abuse of executive power, *see, e.g.*, *Munaf v. Geren,* 128 S. Ct. 2207 (2008); *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc). We have also published studies of how to address serious imbalances in the Separation of Powers caused by national security policy. *See, e.g.*, Aziz Huq, *12 Steps to Restore Checks and Balances* (2007). Congressional staff also draw on our expertise in addressing separation-of-power legal questions.

Reasons Why Amicus Curiae's Expertise Will Be Beneficial to this Court

Based upon its extensive experience and expertise, the Brennan Center is deeply concerned about the threats to the independent role of the judiciary posed by the Government's motion to dismiss. Plaintiffs have alleged widespread executive non-compliance with privacy laws and constitutional obligations, resulting in grave breaches of Americans' core privacy rights. The Government's motion to dismiss on the basis of a newly enacted statute, 50 U.S.C. § 1885a, reflects a combined effort on behalf of the Congress and the Executive to interfere with the courts' adjudication of these troubling allegations. As such, it represents a deeply problematic political incursion into the fundamental Article III responsibilities of the Judicial Branch.

(footnote continued from preceding page)
0409); Brief for Retired Federal Judges as Amici Curiae, *Mohammed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (9th Cir. July 10, 2008); Brief for Retired Federal Judges as Amici Curiae, *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008) (No. 06-4216); Brief of Habeas Corpus Scholars as Amici Curiae, *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) (Nos. 06-1195, 06-1196); Brief of Brennan Center and Professor William N. Eskridge Jr., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2008) (No. 05-184); Brief for Brennan Center as Amicus Curiae, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) (05-6396).

Amicus respectfully submits that no other amicus curiae has addressed—nor is uniquely qualified to address—the distinctive and unusual separation-of-powers problems raised by § 802 of the Foreign Intelligence Surveillance Act ("§ 802"). These problems are novel and arise from the recently enacted legislation. Amicus has a deep well of experience and scholarship that can be brought to bear in aid of the Court's deliberations in this action.

This Court has broad discretion to permit an organization's participation in a suit as an amicus curiae. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987). In this jurisdiction, "[d]istrict courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved." *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2002). Similarly, if a non-party can offer a "unique . . . perspective that can help the court," their participation as amicus is appropriate. *Id.*

Amicus' years of experience bear directly on the questions raised by this case. Accordingly, the Brennan Center respectfully requests leave of the Court to participate in this action as amicus curiae.

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DATED: October 24, 2008

Respectfully submitted,

/s/ Kari E. Hong

KARI E. HONG (CA SBN 220252)
Law Offices of Kari E. Hong
1300 Clay Street, Suite 600
Oakland, CA 94612
Telephone: 510.384.4524
Facsimile: 510.228.0344
Email: kari@honglawfirm.com

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IT IS HEREBY ORDERED THAT the Motion for Leave to File Brief on Behalf of Amicus Curiae Brennan Center for Justice, is GRANTED.

Dated:

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United States Chief Judge Vaughn R. Walker